

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY EALEY,) No. C 07-2616 JF (PR)
Plaintiff,) ORDER OF SERVICE;
vs.) DIRECTING DEFENDANT TO
ALAMEDA COUNTY JAIL,) FILE DISPOSITIVE MOTION
Defendant.) OR NOTICE REGARDING
) SUCH MOTION

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against the Alameda County Jail. Plaintiff has been granted leave to proceed in forma pauperis in a separate written order. The Court will order service of the complaint on the Defendant.

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is

1 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
 2 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
 3 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 5 elements: (1) that a right secured by the Constitution or laws of the United States was
 6 violated, and (2) that the alleged violation was committed by a person acting under the
 7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 Having reviewed the complaint, the Court finds that Plaintiff's allegations,
 9 liberally construed, state a cognizable claim that Defendant violated his Eighth
 10 Amendment rights by acting with deliberate indifference to his serious medical needs.

11 CONCLUSION

12 For the reasons stated above, the Court orders as follows:

13 1. The Clerk of the Court shall issue summons and the United States Marshal
 14 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
 15 attachments thereto, and a copy of this order upon **the Alameda County Jail, 5325**
 16 **Broder Blvd. Dublin, CA 94568.**

17 2. No later than **ninety (90) days** from the date of this order, Defendant shall
 18 file a motion for summary judgment or other dispositive motion with respect to the claim
 19 in the complaint as set forth above.

20 a. If Defendant elects to file a motion to dismiss on the grounds that
 21 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
 22 § 1997e(a), Defendant shall do so in an unenumerated Rule 12(b) motion pursuant to
 23 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
 24 Terhune, 540 U.S. 810 (2003).

25 b. Any motion for summary judgment shall be supported by adequate
 26 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
 27 Civil Procedure. **Defendant is advised that summary judgment cannot be granted,**
 28 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**

1 **the opinion that this case cannot be resolved by summary judgment, he shall so**
 2 **inform the Court prior to the date the summary judgment motion is due.**

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
 4 and served on Defendant no later than **thirty (30) days** from the date Defendant's motion
 5 is filed.

6 a. In the event Defendant files an unenumerated motion to dismiss
 7 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

8 The Defendants have made a motion to dismiss pursuant to Rule
 9 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
 10 exhausted your administrative remedies. The motion will, if granted, result
 11 in the dismissal of your case. When a party you are suing makes a motion
 12 to dismiss for failure to exhaust, and that motion is properly supported by
 13 declarations (or other sworn testimony) and/or documents, you may not
 14 simply rely on what your complaint says. Instead, you must set out specific
 15 facts in declarations, depositions, answers to interrogatories, or documents,
 16 that contradict the facts shown in the Defendant's declarations and
 17 documents and show that you have in fact exhausted your claims. If you do
 18 not submit your own evidence in opposition, the motion to dismiss, if
 19 appropriate, may be granted and the case dismissed.

20 b. In the event Defendant files a motion for summary judgment, the
 21 Ninth Circuit has held that the following notice should be given to Plaintiffs:

22 The defendants have made a motion for summary judgment by
 23 which they seek to have your case dismissed. A motion for summary
 24 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
 25 granted, end your case.

26 Rule 56 tells you what you must do in order to oppose a motion for
 27 summary judgment. Generally, summary judgment must be granted when
 28 there is no genuine issue of material fact--that is, if there is no real dispute
 about any fact that would affect the result of your case, the party who asked
 for summary judgment is entitled to judgment as a matter of law, which will
 end your case. When a party you are suing makes a motion for summary
 judgment that is properly supported by declarations (or other sworn
 testimony), you cannot simply rely on what your complaint says. Instead,
 you must set out specific facts in declarations, depositions, answers to
 interrogatories, or authenticated documents, as provided in Rule 56(e), that
 contradict the facts shown in the defendants' declarations and documents
 and show that there is a genuine issue of material fact for trial. If you do
 not submit your own evidence in opposition, summary judgment, if

27 ¹The following notice is adapted from the summary judgment notice to be given to pro se
 28 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 appropriate, may be entered against you. If summary judgment is granted
 2 in favor of defendants, your case will be dismissed and there will be no
 trial.

3 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 4 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
 5 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
 6 evidence showing triable issues of material fact on every essential element of his claim).
 7 Plaintiff is cautioned that failure to file an opposition to Defendant's motion for summary
 8 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
 9 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
 10 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

11 4. Defendant shall file a reply brief no later than **fifteen (15) days** after
 Plaintiff's opposition is filed.

13 5. The motion shall be deemed submitted as of the date the reply brief is due.
 14 No hearing will be held on the motion unless the Court so orders at a later date.

15 6. All communications by the Plaintiff with the Court must be served on
 Defendant, or Defendant's counsel once counsel has been designated, by mailing a true
 17 copy of the document to Defendant or Defendant's counsel.

18 7. Discovery may be taken in accordance with the Federal Rules of Civil
 Procedure. No further Court order is required before the parties may conduct discovery.

20 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
 Court and all parties informed of any change of address and must comply with the Court's
 22 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
 23 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

24 IT IS SO ORDERED.

25 DATED: 10/5/07



JEREMY FOGEL
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Gregory Ealey
3 BAV875
4 Santa Rita Jail
5 5325 Broder Blvd
6 Dublin, CA 94568
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